

**COPY**  
IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**GUS WILKINS, JR.**

**APPELLANT**

**V.**

**NO. 2007-KA-1643-SCT**

**STATE OF MISSISSIPPI**

**FILED**  
**MAY 29 2008**  
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COURT OF APPEALS

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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MISSISSIPPI OFFICE OF INDIGENT APPEALS  
W. Daniel Hinchcliff, MS Bar No. [REDACTED]  
301 North Lamar Street, Suite 210  
Jackson, Mississippi 39201  
Telephone: 601-576-4200

Counsel for Gus Wilkins, Jr.

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Gus Wilkins, Jr., Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable Lee J. Howard, Circuit Court Judge

This the 29<sup>th</sup> day of May, 2008.

Respectfully Submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

  
W. Daniel Hinchcliff  
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
301 North Lamar Street, Suite 210  
Jackson, Mississippi 39205  
Telephone: 601-576-4200

**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE CASE .....	1
FACTS .....	2
SUMMARY OF THE ARGUMENT .....	5
ARGUMENT .....	5
ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL? .....	5
ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL? .....	7
CONCLUSION .....	8
CERTIFICATE OF SERVICE .....	9

## TABLE OF AUTHORITIES

### CASES

<i>Ashford v. State</i> , 583 So.2d 1279, 1282 (Miss. 1991) .....	8
<i>Groseclose v. State</i> , 440 So. 2d 297, 300 (Miss. 1983) .....	7
<i>Klauk v. State</i> , 940 So.2d 954, 957 (Miss. App. 2006) .....	6
<i>Lee v. State</i> , 469 So. 2d 1225, 1229-1230 (Miss. 1985) .....	5
<i>McNeal v. State</i> , 617 So.2d 999, 1009 (Miss.1993) .....	8
<i>Miley v. State</i> , 935 So.2d 998, 1001 (Miss. 2006) .....	7
<i>Sheffield v. State</i> , 749 So.2d 123, 127 (Miss.1999) .....	8

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**BRIEF OF THE APPELLANT**

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**STATEMENT OF THE ISSUES**

**ISSUE NO 1: WHETHER THE TRAIL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGEMENT NOT WITHSTANDING THE VERDICT?**

**ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL?**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit court of Lowndes County, Mississippi, and a judgement of conviction of sexual battery against Gus Wilkins, Jr. with a resulting sentence of twenty years and an additional five years post release supervision, following a jury trial commenced on September 4, 2007, Honorable Lee J. Howard, presiding. Gus Wilkins, Jr. is presently incarcerated with the Mississippi Department of Corrections.

## FACTS

The opening statement of Appellant Gus Wilkins, Jr., [“Wilkins”], informed the jury of the only disputed fact, the matter of whether or not the sexual encounter between the victim “Jane Doe”<sup>1</sup> and Wilkins was consensual or not.

The testimony began with Jane Doe. She testified that she was sixteen in July of 2006 when she first met Wilkins, who was introduced to her as a cousin. Curiously, she was unable to identify him in the courtroom. (T. 95)

On the date in question, Jane was at Sims Scott Park. She sent a text message to a family member, Demetrius Palmer, to come to the park and pick her up, but when he hadn’t arrived after an hour she began to walk home. (T. 97) Wilkins came up to her as she walked and introduced her to two of his friends. He volunteered to walk with her to the apartment where Demetrius was. Wilkin’s mother lived in the same complex.

As they neared the apartments, Jane claimed Wilkins grabbed neck and told her that if she made a sound he would snap it. (T. 99) They then went to an abandoned house a block away. Her testimony was called into question, as it required that she walk within twenty feet of the apartment where she had friends and family without crying out or running, and that she claimed to be held by the neck, for a distance of at least one city block, on a warm July evening, without anyone being aware of her abduction. (T. 116-118) She did not try to run or scream because he was bigger than her, (T. 101) despite the fact that at that point she did not know Wilkin’s intentions. For all she knew, if her testimony were true, he may have intended to kill her. She claimed the route to the abandoned house from the apartments was a straight shot, but this was demonstrated to be incorrect. (T. 100, 115-117)

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<sup>1</sup> The pseudonym “Jane Doe” will be used to protect the identity of the purported victim.

When they reached the abandoned house, she claimed Wilkins took off her pants and lifted her shirt and laid her down amid broken glass (apparently without resistance or even protest). (T. 101) However, she incurred not one single cut. (T. 121) When Jane went to the hospital later that night, the examining nurse found no signs of trauma on her body, not a drop of blood. (T. 141) Nor did the police find evidence to support of her having lain in a bed of glass. (T. 182) There were no marks on her body, not a scratch.

Jane Doe claimed the sequence of events were as follows; that Wilkins first licked her body, next was oral engagement culminating in intercourse. This was different from the sequence given at the hospital. (T. 102,147, 181)

Incredibly, she claimed that after the occurrence, Wilkins gave her the discarded pants and then walked her home, to the apartment in which her two brothers and boyfriend could be found. She did not relate what happened to a group of men, relatives and friends, who could have immediately apprehended her alleged assailant. Instead she then asked Demetrius Palmer to take her home and then told him about the occurrence with Wilkins. (T. 103-104) She bathed and threw out her clothes.

During cross examination she denied having told Investigator Louis Alexander that Wilkins told her he loved her. (T. 112) Investigator Alexander flatly contradicted this assertion. (T. 180) She did tell him that. She refused to make a written statement about the claimed assault to the investigating officer. (T. 126) She claimed she refused because he treated her like she was the criminal. She claimed to have told Wilkins' mother about the event that night, but the mother said Jane told her about sex occurring in the park, not at the abandoned house. (T. 124, 207)

Demetrius Palmer, testified that he received the text to pick up Jane and he was going to pick her up after picking up some take out Chinese food.. She then texted him she would meet him at the

apartment. (T. 132) Nowhere in her testimony did she mention that Demetrius got back to her and told her he would be late. She had claimed that after she had waited an hour she began walking. By her own testimony, this leaves an hour or so window, of Jane in the park, after dark and knowing her ride would not be coming anytime soon.

When Jane finally showed up at the apartment, Demetrius felt she was not acting like herself. (T. 134) She eventually told him she was raped. Yet he didn't gather up her other brother and friends that were present and go after Wilkins. Furthermore, when the police came to him, he would not make a statement to the police. (T. 136)

Amy Riley, a nurse at the emergency room, noted that Jane came in around 12:20. (T. 138) She appeared healthy, anxious and nervous. (T. 139) She said nothing about distraught or angry. She did a rape kit, and noted that there was no trauma. No tearing or bruising. (Such as one might expect with forced intercourse.) White fluid, later stipulated to be Wilkins semen, was retrieved from her vaginal vault. (T. 142)

Several days after the event, Gary Moore of the Columbus Police Department, got a statement from Jane. He arrested Wilkins who consented to a DNA blood test. (T. 163-164)

After the State rested, Wilkins, through his counsel, moved for a directed verdict, arguing that Jane had never expressed any protestation to intercourse, that her testimony was not credible. The motion was over-ruled. (T. 175-176)

Wilkins defense established the following facts. The initial investigator did not request a sexual assault kit while at the hospital. He taped the victim's statement, which it was earlier admitted is a not common occurrence, a technique sometimes used to uncover evidence on behalf of the defendant. (T. 165-167) The defendant was not taped, something that investigators try to do. These facts all attest to the skepticism of the police. Demetrius would not give him a statement



concerning his sister's claim of a sexual assault. A neighbor testified that you would expect to have people outdoors at the time of the alleged assault, the warm July evening. (T. 193-194) The State had not produced one witness who saw Wilkins and Jane walking down the streets together. Wilkins' mother was the last witness for the defense. Jane Doe, her head down, told her it happened in the park, not an abandoned house. She didn't appear upset. (T. 206-207)

The defense rested and the State finally rested. (T. 210)

### **SUMMARY OF THE ARGUMENT**

As a matter of law, the uncorroborated and un-impeached testimony of a single witness can support a conviction of sexual assault. Conversely, unsubstantiated testimony that is improbable and replete with impeachment, as a matter of law is not sufficient to sustain a jury's verdict.

The weight of the evidence supported the fact of consensual sexual intercourse, by monumental proportion.

### **ARGUMENT**

#### **ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL?**

Wilkins' motion for acquittal notwithstanding the verdict testing the sufficiency of the evidence supporting the verdict was denied perfunctorily. Perhaps the evidence should have been examined more critically. In this case the evidence, all the evidence, not just the evidence supporting the State's case, even when examined in the light most favorable to the State, is not sufficient to support the verdict. *Lee v. State*, 469 So. 2d 1225, 1229-1230 (Miss. 1985) The issue of contention was whether or not the sexual acts between Jane Doe and the Appellant, Gus Wilkins, Jr., was consensual. While Jane Doe complained that the sex was not, her testimony was substantially impeached, her actions not consistent with the victim of a sexual assault, and when viewed as a whole, simply incredible. "Our case law clearly holds that the unsupported word of the victim of a

sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized. The victim's physical and mental condition after the incident, as well as the fact that the incident was immediately reported is recognized as corroborating evidence." *Klauk v. State*, 940 So.2d 954, 957 (Miss. App. 2006)

We begin, as set forth in the above related facts, that she could not identify Wilkins in court. This was a man she supposedly had been introduced to as a cousin, and walked together with for some distance, prior to the sexual encounter. When she requested a ride home, she claimed to have waited an hour, but her brother/cousin Demetrious Palmer testified he informed her he was out getting food. Why wait? These two facts, when combined suggest a casual encounter in the park, as she told Wilkins' mother, not an abduction followed by an assault.

Jane claimed Wilkins introduced her to two of his friends. This would make no sense, if Wilkins planned to force himself upon Jane. Jane made no effort to break away or call for help as she was walked within 20 feet of sure rescue. If Jane's account was true, it was an unusual July evening, as no one was sitting out or standing on a corner.

Jane claimed the violation occurred upon a bed of broken glass, but she did not receive even a tiny scratch. Despite a claim of forceful unwanted intercourse, there was no injury noted by the examining nurse. While no doubt she had sexual intercourse with Wilkins, neither her actions after the event, nor Wilkins are consistent with an assault. He walked her to the apartment where her boyfriend and two brothers awaited. She did not immediately relate the incident.

Her testimony was directly contradicted by Investigator Alexander. She denied telling him Wilkins told her he loved her. She refused to give him a written statement. She was further impeached by Wilkins' mother. While claiming to have informed the mother of the act, the mother

testified Jane told her about a sexual encounter that occurred at the park, rather than upon the glass strewn abandoned house. A house no police officer ever bothered to enter for the purpose of gathering evidence. The police indicated their skepticism of Jane's version of the events in several ways: the delay in requesting a sexual assault kit be done, taping Jane's statement, not the defendant. All this points to a mutual encounter in the park, not an assault.

The State's version is improbable and impeached. Accordingly, it should not be accepted.

Should the facts and inferences considered in a challenge to the sufficiency of the evidence "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," the proper remedy is for the appellate court to reverse and render. *Bush*, 895 So.2d at 843 (quoting *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985)).

*Miley v. State*, 935 So.2d 998, 1001 (Miss. 2006) The element of Jane's consent is simply much more probable than her lack thereof. To allow this conviction to stand would "sanction an unconscionable injustice." *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983)

**ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL?**

Although, as set forth above, the element of lack of consent is lacking from the proofs and this cause should be reversed and rendered, the verdict is also against the weight of the evidence. In support thereof, the above argument and the facts are adopted herein. The weight of evidence supports consent.

A motion for a new trial falls within a lower standard of review than does that of a judgment notwithstanding the verdict or a directed verdict. A motion for a new trial simply challenges the weight of the evidence. "The Supreme Court will reverse the lower court's denial of a motion for a new trial only if, by doing so, the court abused its discretion." (Citation omitted). "We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice." *Groseclose v. State*, 440 So.2d 297, 300

(Miss.1983). Likewise, factual disputes are properly resolved by a jury and do not mandate a new trial. *McNeal v. State*, 617 So.2d 999, 1009 (Miss.1993).

*Sheffield v. State*, 749 So.2d 123, 127 (Miss.1999) Apparently, this jury decided to disregard the burden of proof beyond a reasonable doubt, and err on the side of the purported victim, contrary to the very fundamental right of a criminal defendant to a fair trial. But as stated by this Court:

The question before us is not whether the defendants are in fact guilty or are probably guilty, but whether the State has made out beyond a reasonable doubt a case sufficient to withstand the weight of testimony consistent with innocence. The doubt that reasonable men engaged in a search for truth could safely accept and act upon the evidence to a moral certainty of guilty must be resolved in favor of the (Citations omitted) The law demands that we reverse when we are confronted with a case where no reasonable juror could have found the defendant guilty beyond a reasonable doubt.(Citations omitted) Because the prosecution's only eyewitness was far off base in his physical description, we regard today's such a case.

*Ashford v. State*, 583 So.2d 1279, 1282 (Miss. 1991) If an inaccurate identification rises to the level need to reverse, the facts of this case, including a total lack of recognition of the defendant in the courtroom, necessitates reversal.

### CONCLUSION

Gus Wilkins, Jr. is entitled to have the judgement and sentence of the lower court reversed and rendered or in the alternative, have his conviction reversed and remanded for a new trial.

Respectfully submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

  
W. DANIEL HINCHCLIFF  
MISSISSIPPI BAR NO. [REDACTED]

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
301 North Lamar Street, Suite 210  
Jackson, Mississippi 39205  
Telephone: 601-576-4200

## CERTIFICATE OF SERVICE

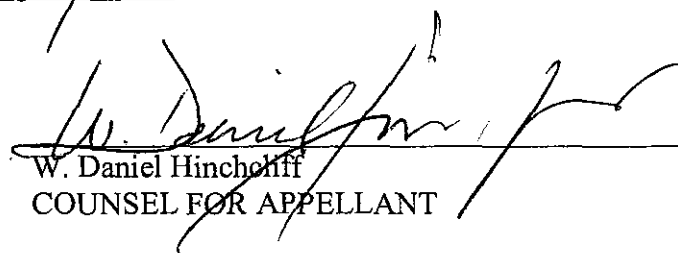
I, W. Daniel Hinchcliff, Counsel for Gus Wilkins, Jr., do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Lee J. Howard  
Circuit Court Judge  
518 2nd Avenue North  
Starkville, MS 39759

Honorable Forrest Allgood  
District Attorney, District 16  
Post Office Box 1044  
Columbus, MS 39703

Honorable Jim Hood  
Attorney General  
Post Office Box 220  
Jackson, MS 39205-0220

This the 29<sup>th</sup> day of May, 2008.

  
W. Daniel Hinchcliff  
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
301 North Lamar Street, Suite 210  
Jackson, Mississippi 39201  
Telephone: 601-576-4200